In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-575

ZENAIDA SARMENTA SEGURA, a/k/a
ZENAIDA SARMENTA TOMANENG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that, as a non-immigrant visitor who fraudulently procured an adjustment of status which was subsequently rescinded, she is entitled to relief under Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f).

Petitioner, a citizen of the Philippines, was admitted as a non-immigrant visitor on January 27, 1968, at Honolulu, Hawaii, for a period of two months (R. 36(c)).[1] On March 22, 1968, her application for extension of stay was denied and she was granted until April 21, 1968, to depart voluntarily (R. 18, 32). On April 6, 1968, she married a permanent resident alien, Manuel Tomaneng. As a result of this marriage, petitioner's status was adjusted to that of a permanent resident alien pursuant to

[1] "R." refers to the certified administrative record filed with the court of appeals.

Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255 (R. 18, 32). On August 12, 1972, the adjustment of status was rescinded pursuant to Section 246 of the Act, 8 U.S.C. 1256, upon the finding that she had entered into her marriage solely for the purpose of procuring permanent resident alien status (R. 18, 32). Following rescission, petitioner's status reverted back to that of a temporary visitor. Although she was granted the opportunity to depart voluntarily from the United States without the issuance of an order to show cause why she should not be deported, she failed to leave within the specified time (R. 18, 32).[2]

Prior to the rescission, however, petitioner received a final judgment of divorce from Manuel Tomaneng and remarried a permanent resident alien who is now a naturalized citizen (R. 28, 34). A child, who is a United States citizen, was born on January 15, 1972. On March 14, 1973, petitioner was served with an order to show cause that alleged that she was deportable under Section 241(a)(2), 8 U.S.C. 1251(a)(2), for remaining in this country longer than the prescribed time. Petitioner then moved for a termination of deportation proceedings under Section 241(f), 8 U.S.C. 1251(f),[3] contending that since

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[2]An alien who has been deported must receive special authorization from the Attorney General before she may reenter this country. 8 U.S.C. 1182(a)(17). If a deportable alien departs voluntarily she is not subject to this disability.

[3]Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), provides:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

she had obtained her adjustment of status by means of a fraudulent marriage,[4] she came within the ambit of the section. The Immigration Judge held that petitioner was deportable as charged and that Section 241(f) is not applicable to aliens who enter the country as non-immigrants. The Board of Immigration Appeals dismissed her appeal (Pet. App. B). In a summary order the court of appeals affirmed (Pet. App. A).

1. Contrary to petitioner's contention, Section 241(f) does not apply to aliens who obtain temporary admission as non-immigrants and subsequently are to be deported for remaining longer than the prescribed time, even if the temporary admission were obtained fraudulently. Section 241(f) is properly invoked only if the fraud is germane to the charge under which the person is being deported. *Cabuco-Flores* v. *Immigration and Naturalization Service*, 477 F.2d 108, 110 (C.A. 9), certiorari denied *sub nom. Mangabat* v. *Immigration and Naturalization Service*, 414 U.S. 841; *Khadjennouri* v. *Immigration and Naturalization Service*, 460 F.2d 461, 462 (C.A. 9). Since deportation under Section 241(a)(2) does not require a showing of fraud but simply demands proof that petitioner was admitted as a nonimmigrant visitor and did not depart upon expiration of the authorized time, Section 241(f) is not applicable.[5]

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[4]Petitioner does not challenge the finding of fraud which led to the rescission of her adjustment of status. In fact, it is this very fraud, she contends, which entitles her to Section 241(f) relief. At the deportation hearing petitioner admitted all allegations contained in the order to show cause (R. 18). She acknowledged that she had been admitted as a temporary visitor, that the adjustment of status was rescinded on the basis of fraud, and that she had been granted the privilege of departing voluntarily but failed to do so (R. 30-32).

[5]At the deportation hearing petitioner stated that she had obtained her visitor's visa by fraud, but she did not rely upon this fraud in order to invoke Section 241(f) in the court of appeals (Pet. 5, n. 4). In any event, such subjective fraud is irrelevant to a charge of overstay. *Milande* v. *Immigration and Naturalization Service*, 484 F.2d 774, 776 (C.A. 7).

Petitioner's reliance upon *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214, is misplaced. Neither Section 241(f) nor *Errico* makes fraud an "affirmative defense, independently exculpatory without regard to the proof required to establish the ground for deportability relied upon by the government." *Cabuco-Flores* v. *Immigration and Naturalization Service, supra*, 477 F.2d at 110. As interpreted by *Errico*, Section 241(f) requires that the deportation charge result directly from the fraud. Petitioner, however, is not to be deported because of her fraudulent marriage; the rescission of her adjustment of status as a permanent resident alien simply returned petitioner to her rightful status as a visitor and as such she is deportable for remaining longer than the prescribed time.

2. Moreover, by its terms Section 241(f) is applicable only to the deportation of aliens "on the ground that they were excludable at the time of entry as aliens who have sought * * * entry into the United States by fraud or misrepresentation * * *." Even assuming, therefore, that petitioner is to be deported because of her fraudulent procurement of an adjustment of status, she is nevertheless ineligible for special treatment under Section 241 (f), since her fraud was not committed "at the time of entry * * *."

Petitioner argues, however, that her fraud should be construed to have been committed at the time of entry, since an alien seeking adjustment of status is functionally equivalent to an alien outside the United States applying for admission as an immigrant. While we agree that an alien requesting adjustment of status is functionally equivalent to an alien outside the United States to the extent that she must be eligible to receive an immigrant visa and be admissible to this country for permanent

residence, neither the language nor the legislative history of Section 241(f) indicates that an alien requesting adjustment of status is also functionally equivalent to an alien outside the United States for the purpose of obtaining the benefits of that section. The language of the section is explicit: It provides relief from deportation expressly for aliens who "were excludable at the *time of entry*" (emphasis supplied). Moreover, the legislative history relied on by the court in *Errico* indicates that the section was limited to misrepresentations to gain entry. 385 U.S. at 221-223. The few courts which have been presented with this issue have uniformly held that the benefits of Section 241(f) are not applicable to fraud occurring *after* entry. See *Khadjenouri* v. *Immigration and Naturalization Service*, 460 F.2d 461 (C.A. 9); *Ferrante* v. *Immigration and Naturalization Service*, 399 F.2d 98 (C.A. 6).[6]

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[6]Petitioner's reliance on *Ambra* v. *Aherns*, 325 F.2d 468 (C.A. 5), in support of a purported conflict is misplaced. In that case, an alien brought a declaratory judgment action to review the denial of his application for adjustment of status from that of a nonimmigrant temporary visitor to that of a permanent resident. The court of appeals sustained the district court's finding that the alien was not entitled to the requested relief, holding that the Immigration and Naturalization Service was not required to furnish the alien with a detailed statement of fact upon which the denial was based. Contrary to petitioner's claim, the court in *Ambra* did not equate the Attorney General's discretion in adjustment of status to that of a consular officer in the issuance of a visa. Moreover, that case did not involve the application of Section 241(f) to fraud in seeking a change of status.

The purpose of the doctrine of "functional equivalency" is simply to assure that adjustment of status under Section 245 does not present a means for circumventing the minimum requirements for entry into the United States as a permanent resident alien. There is nothing arbitrary therefore, in Congress' decision to limit the ameliorative benefits of Section 241(f) to aliens who enter the United States fraudulently, and thereby to exclude from those benefits aliens who, once within the United States, fraudulently seek to adjust their status.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[7]

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[7]There is no reason to defer consideration of this case pending resolution of *Reid* v. *Immigration and Naturalization Service*, No. 73-1541, certiorari granted October 15, 1974. *Reid* involves the narrow issue whether an alien who enters this country under a false claim of citizenship is entitled to the benefits of Section 241(f). Here, unlike *Reid*, the circuits have uniformly held that such relief is unavailable to one who commits fraud in seeking adjustment of status. Moreover, the charge of deportability in the instant case is unrelated to the clai of fraud.